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Supreme Court, U.S.
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In The

Supreme Court of the United States

TIBER SHIPPING LLC;
RIO GRANDE TRANSPORTS, *in personam*,

Petitioners,

v.

BP OIL INTERNATIONAL LTD; BP EXPLORATION & OIL INC; EMPRESA ESTATAL PETROLEOS DEL ECUADOR (Petroecuador),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BP OIL INTERNATIONAL LTD., and BP EXPLORATION AND OIL, INC.,	§	
Plaintiffs	§	
vs.	§	CIVIL ACTION
EMPRESA ESTATAL PETROLEOS DEL ECUADOR (PETROECUADOR), M/T TIBER, her engines, tackle and gear, TIBER SHIPPING, LLC and RIO GRANDE TRANSPORT, and SAYBOLT, INC.	§	NO. H-99-1475
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Nov. 13, 2001)

I. INTRODUCTION

Before the Court are the defendant, Saybolt, Inc.'s ("Saybolt") motion for summary judgment (#38), the defendant, Empress Estatal Petroleos del Ecuador's motions to amend its responses to admissions (#69); and to apply the law of Ecuador ("PetroEcuador") (#68); and the plaintiffs, BP Oil International LTD's

and BP Exploration and Oil, Inc.'s ("BP Oil") motion for summary judgment (#74) against PetroEcuador.

After considering the motions, the responses, the replies, the record and the applicable law, the Court is of the opinion that the law of Ecuador applies, that BP Oil's Motion For Summary Judgment should be denied, that PetroEcuador's Motion to Amend its answer to BP Oil's Request For Admissions should be Granted[1] and that Saybolt's motion for summary judgment should be granted.

II. FACTS

BP Oil contracted to sell approximately six million gallons of high octane naphtha[2] to PetroEcuador to be shipped by tanker from Houston to Ecuador. The agreement further required that the product meet set specifications or standards determined by the terms of the Contract and that the product be tested for conformity with those standards upon arrival in Ecuador.

Saybolt tested the product before it left Houston and reported that the product was within contract

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[1] Based upon new evidence discovered by PetroEcuador, that being the interpretation of Ecuadorian law as applied to the CFR terms of the Contract, the Court allows PetroEcuador to amend its answers to BP Oil's Request For Admissions.

[2] Naphtha is any of various volatile, highly flammable, liquid hydrocarbon mixtures used chiefly as solvents and diluents and as raw materials for conversion to gasoline.

standards. However, PetroEcuador disputes the fact of conformity of the product upon arrival in Ecuador. According to PetroEcuador, the "gum" content of the product was substantially higher upon arrival than reported in Houston.[3] When it ascertained that the product was not within the specifications of the contract, PetroEcuador refused to allow the product to be discharged from the ship, rejecting the delivery. As a result, BP Oil shipped the naphtha back to Houston and sold it at a loss to Shell Oil.

On May 14, 1999, BP Oil filed this lawsuit against PetroEcuador for breach of contract and wrongful draw on a letter of guaranty. Additionally, on October 19, 1999, BP Oil filed an admiralty claim against M/T TIBER, her engines, tackle and gear, and TS & RGT. By Order of this Court, dated February 4, 2000, these cases were consolidated. Later, on April 20, 2000, BP Oil added Saybolt as a defendant.

III. CONTENTIONS OF THE PARTIES

BP Oil, in seeking summary judgment on the issue of liability against PetroEcuador, contends that irrespective of whether international contract law is applied, specifically the United Nations Convention on the Contracts for the International Sale of Goods

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[3] The Contract required that the gum content of the naphtha not exceed 3mg/100ml. When tested in Ecuador the gum content was 11.6mg/100ml.

("CISG")[4], or the law of Ecuador, PetroEcuador is liable to it for all damages arising from PetroEcuador's breach of contract. BP Oil contends that this is so because as seller, it performed all of its obligations under the terms of the Contract. PetroEcuador asserts, pursuant to agreement, that the law of Ecuador applies and, as a matter of Ecuadorian law, that it was within its rights to refuse a non-conforming product without recourse.

IV. STANDARD OF REVIEW

A. Rule 56(c) Motions

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to . . . judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial burden of "informing the Court of the basis of its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings" and designate "specific facts" in the record "showing that

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[4] *See* 15 U.S.C.A. App., United Nations Convention on International Sales (1983).

there is a genuine issue for trial." *Id.* at 324. An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986). A failure on the part of the nonmoving party to offer proof concerning an essential element of its case necessarily renders all other facts immaterial and mandates a finding that no genuine issue of fact exists. *See Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

The primary inquiry here is whether the material facts present a sufficient disagreement as to require a trial, or whether the facts are sufficiently one-sided that one party should prevail as a matter of law. *See Anderson*, 477 U.S. at 251-52. The substantive law of the case identifies which facts are material. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of a summary judgment. *Id.*

V. DISCUSSION CHOICE OF LAW

A. BP Oil's Motion For Summary Judgment

1. Choice of law

BP Oil contends, notwithstanding the choice-of-law clause set forth within the contract, that the law of Ecuador does not apply to this case. Rather, BP Oil contends, the CISG applies because the United States and Ecuador are signatories to the CISG. PetroEcuador asserts, on the contrary, that the choice of law

clause within the contract controls what law is applicable to this dispute. Thus, PetroEcuador asserts that the law of Ecuador applies. The Court will examine this dispute within the parameter of Texas conflict of laws provisions.

Federal district courts apply the choice of law rules of the state in which they sit. *See Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 452 n.2 (5th Cir. 2001) (citation omitted); *Resolution Trust Corp. v. Northpark Joint Venture*, 958 F.2d 1313, 1318 (5th Cir 1992); *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 285 (5th Cir. 1988). Texas choice of law rules recognize valid choice of law clauses. *Interfirst Bank Clifton*, 958 F.2d at 285 (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984)). Thus, parties may agree to a choice of law or choice of forum clause by contract. *See, e.g., Haynsworth v. The Corp.*, 121 F.3d 956, 961-69 (5th Cir. 1997); *Gulf Ins. Co. v. M/V Rei Feng*, ___ F. Supp.3d ___ (S.D. Tex. 2001). Such agreements, absent a violation of federal or state law, and public policy, are valid and enforceable. *Haynsworth*, 121 F.3d at 961-69; *Gulf Ins. Co.*, ___ F. Supp.3d at ___; *see also Cherokee Pump & Equip. Inc., v. Aurora Pump*, 38 F.3d 246 (5th Cir. 1994).

"Under the Texas rules, in those contract cases in which the parties have agreed to an enforceable choice of law clause, the law of the chosen [nation] must be applied." *Resolution Trust Corp.*, 958 F.2d at 1318 (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 678 (Tex. 1990)). Absent ambiguity, a court should enforce the parties' agreement. Concerning

contract interpretation, it is basic that absent ambiguity in a contract the four corners of the agreement best represent the intentions of the parties. *See, e.g., Palma v. Verex Assurance, Inc.*, 79 F.3d 1453, 1458 (5th Cir. 1996); *Chapman v. Hootman*, 999 S.W.2d 118, 122-23 (Tex. App.-Houston [14th Dist.] 1999, no writ) (citing *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)).

BP Oil proffers case law for the propositions that Texas applies a more significant relationship test to the disputed transaction. Therefore, Texas laws should apply to the present dispute. Following this line of thinking, BP Oil argues that the CISG is applicable because the choice of law clause at issue is permissive and not binding and because the law of Ecuador and Texas (controlled by the CISG), or Connecticut (controlled by the CISG) are the same concerning a shipment of conforming or non-conforming goods.

The Court rejects BP Oil's assertions and arguments. The choice of law clause within the contract is clear and unambiguous. The law of the Republic of Ecuador applies. It is clear that the parties intended that their transaction to be guided by the law of Ecuador by the four corners of the contract. The fact that the clause, setting forth the choice of law provision, is titled "Jurisdiction" does not make the choice of law provision ambiguous. Moreover, there is nothing in the record that otherwise suggests that BP Oil was misled by any term of the contract. And, BP Oil does not claim that PetroEcuador misrepresented any

fact. Thus, the Court concludes that the law of Ecuador govern the parties' transaction.[5]

2. Cost of Freight-Term Inapplicable

Next, BP Oil points out that the contract also contains a Cost and Freight ("CFR") term. Relying on the International Chamber of Commerce definition, which the CISG incorporates, BP Oil interprets the CFR term to call for the risk of loss to pass to PetroEcuador at the time that the product is delivered to the common carrier. This interpretation is flawed. Under the law of Ecuador, the seller must

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[5] BP Oil's contention that the CISG prevents the laws of Ecuador from applying is similarly unpersuasive. Article Six of the CISG provides " . . . parties may exclude the application of [the CISG] or, subject to article 12, derogate from or vary the effect of any of [the CISG's] provisions." 15 U.S.C.A. App., UN Conv. Int. Sale. Courts have interpreted Article Six to stand for the proposition that parties may contract out of CISG provisions that apply to an international sales contract. *See, e.g., Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 n.1 (2d Cir. 1995) (holding that the CISG allows "parties [to] contract . . . to be bound by a source other than the CISG . . . "); *Supermicro Computer Inc., v. Digitechnic, S.A.*, 145 F. Supp.2d 1147, 1151 (N.D. Cal. 2001) (holding that where a choice of law provision appears in a contract between parties to a contract where the parties' nations are signatories to the CISG, if a choice-of-law provision is silent as to what law controls the parties' transaction, then the CISG controls); *see also, e.g., Fercus, S.R.L., v. Palazzo*, No. CIV.7728 (NRB), 2000 WL 1118925, at *2 (S.D.N.Y. Aug 8, 2000) (holding that one factor to determine if the CISG applies to an international sale of goods is when " . . . the contract between the parties *does not* have a choice of law provision.").

deliver conforming goods at the agreed destination. Here, that destination, was PetroEcuador's facility in Ecuador.[6] There is no genuine dispute that BP Oil failed to deliver conforming goods according to the contract. Therefore, PetroEcuador is not obligated under the CFR term, and BP Oil's motion for summary judgment, on the issues of breach of contract and cost of freight charges, is denied.

VI. Saybolt's Motion For Summary Judgment

In its Second Amended Complaint (#29), BP Oil asserted, for the first time, a cause of action against Saybolt. Saybolt's duty was to ensure that the product in question met the specifications of the PetroEcuador/BP Oil contract prior to loading. BP Oil claims that Saybolt was negligent in its testing and thereby became vicariously liable for BP Oil's damages proximately caused by Saybolt's negligence. Since, BP Oil amended its pleading by a Third

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[6] The Court, in accords with Federal Rules of Civil Procedure 44.1, *see* FED. R. CIV. P. 44.1; *Randall v. Arabian Am. Oil Co.*, 778 F.2d 1146, 1151 n.4 (5th Cir. 1985); *Access Telecom, Inc., v. MCI Telecommunications Corp.*, 197 F.3d 694, 713 (5th Cir. 1999), takes judicial notice of an affidavit submitted by PetroEcuador's expert witness, Dr. Gustavo Romero, who is admitted to practice law before the Supreme Court of Ecuador and all jurisdictions within that country, that Ecuadorian law, Articles 705-06 and 719, published in the Supplement to the Official Register (of Ecuador) No. 104 on November 20, 1970, provides that a seller has a duty to deliver conforming goods to the agreed place of delivery.

Amended Complaint (#47). There, BP Oil asserts a contract claim against Saybolt for indemnify [sic] and to be held harmless from any damages that may have resulted from the non-conforming product.

A. Saybolt's Contentions

Saybolt has filed a motion for summary judgment asserting a limitation of liability defense and a waiver of claims based on the terms of the contract for the testing services between Saybolt and BP Oil. Thus, Saybolt contends that the total liability for-which it may have exposure does not exceed the amount paid by BP Oil for the testing performed by Saybolt.

Saybolt contends that the contract between BP Oil and PetroEcuador permitted PetroEcuador to select an independent lab to test the product. Pursuant to that contract, PetroEcuador selected Saybolt. Saybolt asserts that it performed the test in accordance with a longstanding Inspection Service Agreement ("ISA") that it has with BP Oil that dates back to 1992. Saybolt also contends that the billing and payment instructions contain a provision that limits Saybolt's liability to the amount of the testing charges. Saybolt argues that this limitation of liability provision is also part of BP Oil's standard terms and conditions that is customarily imposed upon inspection companies like Saybolt. The relevant provisions of the BP Oil/Saybolt contract provide:

> All services performed by Petroleum Inspection Company (hereinafter referred to as "Inspection Company") for BP Oil Company (hereinafter called "BP Oil") are undertaken and the rates and charges of Inspection Company are based upon the following terms and conditions:
>
> 1. The total liability of Inspection Company, its officers, employees, agents, or subcontractors for any loss or damage claimed, either directly or indirectly, in contract, tort or otherwise in connection with the performance or nonperformance of the work involved shall not exceed the amount paid or payable by BP Oil for such work.

Saybolt contends that other contract provisions also support its claim that Saybolt is not liable, as a matter of law, on BP Oil's claims. The contract provides:

> All claims made against Inspection Company must be in writing within forty-five (45) days after delivery of Inspection Company's report regarding said services or such claim shall be deemed irrevocably waived.

Therefore, Saybolt asserts that the further defense of waiver or laches applies because BP Oil failed to make a timely claim.

B. BP Oil's Contentions

BP Oil contends that the ISA is the entire agreement between the parties, thereby, negating Saybolt's argument that the billing and payment instruction's invoice should be given effect. BP Oil also contends that the Standard Inspection Rates Agreement ("SIRA") can be, and is, overridden by specific contract provisions such as those in the ISA between BP Oil and Saybolt. Thus, BP Oil contends that Saybolt is liable for all damages, cost and expenses incurred by BP Oil in defending itself against PetroEcuador's suit. The provision relied upon by BP Oil states:

> INSPECTOR hereby indemnifies and agrees to defend and save OWNER and its affiliated corporations, their agents, servants and employees, harmless from all liabilities and claims for loss, damage or injury to or death of persons or property, including property of OWNER, in any manner arising out of or in connection with the INSPECTION, except for such injuries or damage to property as may result from the sole fault or negligence of OWNER or of those parties that OWNER may be responsible for, and INSPECTOR agrees to pay all damages, costs and expenses, including attorneys' fees, arising in connection with this indemnity.

VII. DISCUSSION SAYBOLT CONTRACT CLAIM

This Court is of the opinion and holds that BP Oil's interpretation of the "inspector" provision is

flawed. Moreover, even if BP Oil's interpretation is correct BP Oil is not obliged to litigate its indemnity claim in this suit. This is so because no liability has been established upon which an indemnity suit may rest. The Court interprets the "Inspector" provision as requiring indemnity where Saybolt's actions or conduct result in injury or death to persons or property, or where Saybolt's conduct places the owner in a position that injury or death to a person or property results. Clearly, the provision is designed to place responsibility for harm to persons or property on those who cause it. The easy examples are inquiries to employers or contamination of the owner's product during the inspection process.

In the case at bar, no act is attributed to Saybolt that caused damage or harm to BP Oil's employees or product. The product either met specifications when it left Houston, or it did not. The product either met specifications when it reached Ecuador, or it did not. No act done by Saybolt in Houston, Ecuador, or between the points damaged the product. Thus, the Court concludes that the "Inspector" provision is inapplicable to this case.

The Court is also of the opinion and hold [sic] that BP Oil is bound by the waiver provision in the contract. [*See* PetroEcuador Ex. 4, p. 17]. On or before May 28, 1998, BP Oil became aware that its product would not be discharged by PetroEcuador because the product did not meet contract specifications. Yet, BP Oil did not file a claim against PetroEcuador until

April 20, 2000, well past the 45 days after PetroEcuador refused delivery.

Finally, the Court holds that BP Oil's claim sounds only in contract and seeks indemnity for economic losses resulting from a service provided as opposed to the damages to its product. Therefore, BP Oil has only a suit in contract against Saybolt. *See Arkwright-Boston Mfrs. Mutual Ins. Co. v. Westinghouse Electric Corp.* 844 F.2d 1174 (5th Cir. 1988); *see also Southwestern Bell Tel. Co. v. Delanney*, 809 S.W.2d 493 (Tex. 1991). In this regard, BP Oil irrevocably waived any contractual claim that it may have had against Saybolt when it failed to timely notify Saybolt of its claim. Even if the Court is in error on that point, Saybolt's liability, as an Inspector, is limited to the amount paid by BP Oil for the inspection.

VI [sic]. CONCLUSION

Summary judgment is appropriate where the file establishes that there is no genuine issue as to any material fact. Such is the case here. In light of the foregoing analysis, the Court concludes that BP Oil's Motion For Summary Judgment is DENIED. In so doing, the Court Declares that PetroEcuador is entitled to judgment as a matter of law. PetroEcuador's Motion to Amend its admissions to BP Oil's Request For Admissions is GRANTED. Finally, Saybolt's Motion For Summary Judgment is GRANTED.

It is so ORDERED.

Signed this 9th day of November, 2001.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge